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**Attorneys for Plaintiffs**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

MIKE TOYUKAK et al,

Plaintiffs,

v.

MEAD TREADWELL, et al,

Defendants.

Case No. 3:13-cv-00137-JWS

**OPPOSITION TO DEFENDANTS' OBJECTION TO PLAINTIFFS' EXPERT DANIEL McCOOL**

Plaintiffs respectfully submit this memorandum of law in opposition to Defendants' Objection to Plaintiffs' Expert Daniel McCool ("Objection").

## I. INTRODUCTION AND FACTUAL BACKGROUND

Professor Daniel McCool is a Professor of Political Science at the University of Utah, where he has been employed as a professor since 1987. For over thirty years Professor McCool has studied and performed scholarship regarding the political relationship between American Indians and Anglos (people who are not American Indian or Alaska Native).[1] He has written 9 books, 20 articles, and 18 book chapters, nearly all of which have appeared in peer-reviewed outlets, in addition to assorted book reviews, academic papers, and other scholarly works.[2] Among the topics Professor McCool has studied and published on are Indian voting issues and the Voting Rights Act.[3] He co-authored the book *Native Vote: American Indians, The Voting Rights Act, and the Right to Vote*, published in 2007, and contributed a chapter, in addition to editing, the recent book *The Most Fundamental Right: Contrasting Perspectives of the Voting Rights Act*.[4]

Since 2001, Professor McCool has served as an expert witness in three Voting Rights Act cases involving Native Americans and the context for alleged discriminatory denial of the right to vote.[5] Those cases are *United States v. Blaine County*, 157 F. Supp. 2d 1145 (D. Mont. 2001); *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150 (D.S.D. 2002); and *Cottier v. City of Martin*, 445 F. 3d 1113 (8th Cir. 2006). In each case Professor McCool drafted an analysis using qualitative methods, relying on the Senate factors and the *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986)

[1] Expert Report at 1.
[2] *See* Vita of Daniel Craig McCool.
[3] McCool Depo. at 14:25-15:19.
[4] *See* Expert Report at 1; Vita at 2, 4.
[5] *See* Expert Report at 1; McCool Depo. at 27:12-32:23; 35:7-16

factors that apply in voting discrimination cases.[6] Congress has identified these factors as important in examining the extent to which jurisdictions have been involved in activities that might impact the ability of minority voters to have an equal opportunity to elect candidates of their choice and participate in the political process.[7]

Professor McCool was retained by Plaintiffs to perform a similar analysis and provide expert testimony on the so-called Senate factors and the *Arlington Heights* analysis. Among other issues, Professor McCool was asked to address whether there is a consistent pattern of intentional discrimination in the State of Alaska that has negatively affected the ability of Yup'ik-speaking Alaska Natives living in the Wade Hampton and Dillingham Census Areas to participate in state elections.[8]

To answer that question, Professor McCool utilized qualitative methods (sometimes referred to as qualitative analysis). This method has been well-established and widely used in Political Science since the mid-1980s.[9] It is an effective methodology to analyze patterns of political behavior over time in many different contexts and geographic areas. There is a voluminous methodological literature on qualitative methods, and approximately half of all peer-reviewed publications in Political Science currently use this approach.[10] Qualitative methods involves the use of data and information from multiple and overlapping sources, both primary and secondary, to identify significant long-term trends.[11] Here, Professor McCool reviewed approximately 25,000 pages of materials provided by Plaintiffs' counsel, conducted extensive

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[6] McCool Depo. at 27:12-32:23; 35:7-16; *see* S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29 (describing Senate factors); *see also Arlington Heights v. Metropolitan Hous. Dev. Corp,* 429 U.S. 252, 264-68 (1977).
[7] *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.
[8] Expert Report at 3.
[9] *See* McCool Depo. at 37:22-39:10; Expert Report at 2-3.
[10] *See* Expert Report at 2-3.
[11] *See* McCool Depo. at 39:11-24; Expert Report at 2.

searches on the Internet, consulted 15 books and numerous journal articles, and interviewed people from Wade Hampton and Dillingham about their voting experiences.[12] Additionally, he spent two days in the archives of the Alaska State Library where he "went through 30 or 40 boxes of materials, and visited the Anchorage Museum."[13] Professor McCool read or perused tens of thousands of pages of materials and his final report relies on 183 sources.[14]

In his expert report, Professor McCool discusses and analyzes the material he reviewed (and determined was relevant) in terms of certain of the Senate Factors: "the history of official voting-related discrimination in the state or political subdivision"; "the extent to which voting in the elections of the state or political subdivision is racially polarized"; "the extent to which minority group members bear the effects of discrimination in the areas such as education, [and] employment, . . .which hinder their ability to participate effectively in the political process"; and "whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members."[15] The report also includes a discussion of the historical relationship between language and voting in Alaska.[16] Based on his review and analysis of tens of thousands of pages of materials, Professor McCool concluded "that the long and persistent resistance to Native voting is at least partially explained by prejudice and an intentional desire to limit the voting efficacy of Native people" and that in his "professional opinion the state [of Alaska] has engaged in intentional nonfeasance that is systematic, pervasive, and persistent over many decades." [17]

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[12] McCool Depo. at 54:9-24; 55:9-56:4; 56:22-57:3.
[13] McCool Depo. at 58:7-23.
[14] *See* Expert Report at 48-59; McCool Depo. at 62:14-63:15.
[15] *See* Expert Report at 3-30; S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.
[16] *See* Expert Report at 30-42.
[17] Expert Report at 46-47; *see also* McCool Depo. at 74:9-75:19 (noting "that there's a pattern of discrimination and racist thought and actions [in Alaska] that have an impact on the way people vote.").

Defendants have objected to Professor McCool's expert testimony on the grounds that he is not an expert in Alaska history, that he improperly opines on "intent," and that he has not reliably applied qualitative methods to the facts of this case.[18] Defendants' arguments lack merit. As explained below, Professor McCool's expert opinion is reliable, relevant and admissible and will aid this Court in determining whether the electoral practices being challenged by Plaintiffs result in a violation of the Voting Rights Act and the fourteenth and fifteenth amendments.

## II. ARGUMENT

Federal Rule of Evidence 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[19]

Rule 702 grants "expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'"[20]

The Supreme Court has emphasized the "liberal thrust" of Rule 702, favoring the admissibility of expert testimony.[21] As explained in the Advisory Committee's note accompanying Rule 702, "rejection of expert testimony is the exception rather than the rule."[22] Although the proponent bears the burden of establishing admissibility, there is a presumption in

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[18] *See* Objection at pp. 3-5.
[19] Fed. R. Evid. 702.
[20] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993)).
[21] *Daubert*, 509 U.S. at 588.
[22] Fed. R. Evid. 702 Advisory Committee's Note.

favor of admissibility.[23] Testimony of a qualified expert should therefore be admitted where it has been shown to be adequately relevant and reliable.[24] Expert testimony is relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue."[25]

The reliability analysis focuses on an expert's methodology.[26] Expert testimony is reliable if based on "sufficient underlying facts or data," including "the reliable opinion of other experts" and "hypothetical facts that are supported by the evidence."[27] In addition, where the Court serves as factfinder – as it will in this trial – it has greater flexibility to admit expert testimony. "[T]he importance of the trial court's gatekeeper role is significantly diminished in bench trials [] because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence."[28]

Professor McCool's testimony satisfies the requirements of Rule 702 and should be admitted. Although his scholarship has not previously focused upon Alaska, Professor McCool is a trained political scientist who is skilled in applying qualitative methods and has done extensive research and writing about the relationship between Anglos and Native peoples, and Native peoples' issues including in the area of voting. He has been found qualified and has provided expert testimony similar to the type offered here, namely identifying patterns and trends that relate to the Senate and *Gingles* factors, in three other Voting Rights Act cases. Such testimony will

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[23] *See Pierson v. Ford Motor Co*., No. C 06-6503PJH, 2009 WL 1034233, at *3 (N.D. Cal. Apr. 16, 2009) (citing *Daubert*, 509 U.S. at 588).
[24] *Kumho*, 526 U.S. at 147.
[25] Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) ("*Daubert II*") (Expert testimony is relevant where it "logically advances a material aspect of the proposing party's case.").
[26] *Daubert*, 509 U.S. at 592-93 (courts must make "preliminary assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").
[27] Fed. R. Evid. 702 & Advisory Committee's Note.
[28] *Whitehouse Hotel Ltd. P'ship v. Comm'r of Internal Revenue*, 615 F.3d 321, 330 (5th Cir. 2010) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)); *see also A.A. v. Raymond*, 2013 WL 3816565, at *4 (E.D. Cal. July 22, 2013) ("Most of the safeguards provided for in Daubert are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury.") (citations omitted).

assist the Court in determining whether Defendants acted with discriminatory intent under the *Arlington Heights* factors. Moreover, the alleged inaccuracies and flaws cited by Defendants go at most to the weight of Professor McCool's testimony, not its admissibility.

### A. Professor McCool Is Qualified To Give An Expert Opinion in This Case.

Defendants claim Professor McCool is not "qualified as an expert" because he had not done any research on Alaska prior to being retained as an expert in this case.[29] Their argument relies on a mischaracterization of the expert opinion offered by Professor McCool, namely that he is presenting himself as "an expert on Alaska history" and "offering his opinion on Alaska's history."[30] That is not accurate. Professor McCool's expertise is in applying qualitative methods to Voting Rights Act cases. In that regard, he has decades of experience, and has authored numerous peer-reviewed publications.[31] Professor McCool has also done extensive research on American Indians and studied and written about the Voting Rights Act specifically.[32] And, he has given expert testimony in three other Voting Rights Act cases, and in each case his opinions were arrived at through application of qualitative methodology.[33] While the experiences of American Indians and Alaskan Natives are not identical, they have suffered many similar problems and prejudices, and are similarly situated groups of Native peoples. Indeed, they are even classified together in Section 203 and its implementing regulations.[34]

In preparing his report for this case, Professor McCool "look[ed] at a massive amount of evidence and look[ed] at trends and patterns" to determine if there are themes and "repetitions of

[29] Expert Report at 3.
[30] Objection at 4, 9.
[31] *See* Expert Report at 1-3; Vita.
[32] *See* Expert Report at 1; Vita at 2, 4.
[33] McCool Depo. at 27:12-32:23; 35:7-16.
[34] *See* 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. § 55.12.

the same kind of situations which are indicative of discrimination."[35] Professor McCool researched and analyzed Alaska's history in relation to Alaska Natives because it is one of the Senate factors, but it was not the main focus of his report. Only ten pages of the report covers the historical era; the majority of the report deals with contemporary issues that have arisen in the last two decades. Thus, Defendants' claim that Professor McCool's "'expertise' is the product of only a month's worth of work" is incorrect and misleading[36]; his expertise is based on thirty years of experience and publications relevant to the work performed for this report.

Moreover, the fact that Professor McCool had not previously focused his analyses on Alaska or taught a class on Alaska's history goes at most to the weight of his testimony, not its admissibility.[37] For instance, in *Loudermill v. Dow Chemical Co.*, the court concluded that it was not an abuse of discretion to permit a doctor, who was knowledgeable about toxicology and the liver, to give expert testimony as to whether plaintiff's injuries were caused by exposure to halogenated hydrocarbons such as DBCP, even though doctor admitted he had not done research in that specific area.[38] The court noted that defendant could and did raise the doctor's research shortcomings on cross-examination.[39] Similarly, Defendants can raise their arguments about Professor McCool at trial.

### B. Professor McCool's Testimony Constitutes Admissible Testimony on Discriminatory Intent.

Contrary to Defendants' claim, Professor McCool's opinion is not "intended to simply

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[35] McCool Depo. at 173:9-14.
[36] Objection at 4.
[37] *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993), citing *United States v. Bilson*, 648 F.2d 1238, 1239 (9th Cir. 1981) (that psychiatrist was not licensed psychologist goes to weight not admissibility of testimony evaluating psychological tests).
[38] 863 F.2d 566, 569-570 (9th Cir. 1988).
[39] *Id.*

substitute for this Court's analysis."[40] Nor is he offering impermissible testimony on a party's intent. One of the core issues in this case is whether Defendants' alleged violations of the Voting Rights Act were done with a discriminatory purpose. In a case alleging discriminatory intent, "the plaintiffs must be prepared to prove, under the test established in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp*, 429 U.S. 252, 264-68 (1977), that the challenged practice was adopted, at least in part, because it would harm minority voting strength, and not merely with an expectation that it would do so."[41] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[42] Given the intensity of the inquiry, Professor McCool's expert testimony will assist the Court in assessing whether the Defendants acted with discriminatory intent in adopting or maintaining the challenged voting procedures.[43]

Defendants cite one case, *In re Rezulin Products Liab. Litig.,* 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004), to support their assertion that "Professor McCool's opinion about the State's 'intent' is . . . not a proper subject for expert testimony."[44] In that case, which involved consumers' products liability claims, the court concluded that "the opinions of these witnesses on the intent, motives or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise," and were therefore inadmissible.[45] The court pointed out that by the experts' *own admission,* their opinions had ***no basis in fact or scientific method***.[46] Moreover, there was no claim that the "intent" testimony proffered by the experts was relevant to a particular legal requirement or element in the case.[47] This is totally different from the

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[40] *See* Objection at 4.
[41] http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php.
[42] *Arlington Heights*, 429 U.S. at 266; *see also Gingles*, 478 at 45-46 (describing the test for Section 2 violations as "fact-intensive").
[43] *Khairkhwa v. Obama*, 793 F. Supp. 2d 1, 11 (D.D.C. 2011) ("The 'assist' requirement is satisfied where expert testimony advances the trier of fact's understanding *to any degree*." (emphasis added) (citation and internal quotation marks omitted)).
[44] *See* Objection at 5, n.16.
[45] *Id.* at 546.
[46] *Id.* at n. 40.
[47] *See id.*

present case where Professor McCool, based on his extensive review and analysis of primary and secondary sources including interviews with persons in the Dillingham and Wade Hampton census areas, examined the relationship between language and voting by Native Alaskans, and opined as to evidence of discriminatory intent. As Professor McCool explained during his deposition, "I'm not inferring a motive to the person in the present day. I'm describing a political context which may influence the policies of the state of Alaska and the actions of Alaskan officials, both elected and appointed."[48] His testimony speaks to the exact factors identified in *Arlington Heights*, by the Senate Committee on the Judiciary, and endorsed by the Supreme Court in *Gingles*, as the factors courts should consider when determining if, within the totality of the circumstances in a jurisdiction, there has been discriminatory intent.[49]

In fact, courts routinely have admitted expert testimony of the type Professor McCool seeks to provide in this case. For example, in *Hunt v. Cromartie*, 526 U.S. 541 (1999), the Supreme Court acknowledged the value of expert testimony in deciding whether a legislative action had a political explanation or could only be explained on impermissible racial grounds.[50] Likewise, in *Large v. Fremont County, Wyo*., 709 F. Supp. 2d 1176, 1190-1210 (D. Wyo. 2010), the Plaintiffs offered testimony from four experts, two of whom testified about the three *Gingles* factors; the other two offered testimony about the Senate factors, e.g., socioeconomic disparities and the effect of past and present discrimination. The court in that case considered all the expert

[48] McCool Depo. at 71:3-18.
[49] S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29; *Gingles*, 478 U.S. at 43-45.
[50] *See also Hunter v. Underwood*, 471 U.S. 222, 229, 233 (1985) (affirming the appellate court's ruling that the criminal disenfranchisement provision of the Alabama Constitution "was motivated by a desire to discriminate against blacks on account of race," a finding based in part on "the testimony of two expert historians" regarding legislative intent); *Prejean v. Foster*, 83 F. App'x 5, 11 (5th Cir. 2003) (noting expert testimony conclusions as to motivations behind drawing judicial voting districts); *Cao v. Fed. Election Comm'n*, 688 F. Supp. 2d 498, 505 (E.D. La. 2010) (weighing expert's "assertions about historical trends and political motivations" behind the passage of and challenge to the expenditure provision of the Federal Election Campaign Act notwithstanding that expert opinion regarded facts not in record); *Johnson v. DeSoto County Sch. Bd.*, 995 F. Supp. 1440, 1454-56 (M.D. Fla. 1998) (relying on expert witness testimony that the creation of Florida's at-large nomination and election structure for school board members was racially motivated to find state legislature's discriminatory intent).

testimony.[51] Indeed, Professor McCool has himself provided expert testimony on the Senate factors and *Gingles* factors in three other cases regarding allegations of discriminatory intent.[52]

### C. Purported Factual Errors in Professor McCool's Report Go At Most to the Weight of His Testimony, Not Its Admissibility.

The final argument advanced by Defendants to exclude Professor McCool's testimony is that Professor McCool has not "reliably applied the principles and methods to the facts of the case, as required by F.R.E. 702(d)."[53] Defendants further assert that his "report is littered both with straightforward mistakes, but also with deeply questionable inferences and conclusions."[54] In short, Defendants argue that Professor McCool's testimony should be excluded as unreliable.

The Supreme Court in *Kumho Tire Co.*, 526 U.S. at 152, articulated that the trial court's gatekeeping function is "to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." The Ninth Circuit has applied *Kumho Tire*'s test of the rigors of professional discipline by stating that such a standard is satisfied by expert testimony having a foundation in facts.[55] If a party disputes the sufficiency or application of the expert's factual basis, "that goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[56] Thus, an expert's testimony should only be excluded on grounds of insufficient factual basis in extreme cases, such as "where no combination or addition of data could make the data in question a proper, reliable

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[51] *Id.*
[52] *See* Expert Report at 1; McCool Depo. at 27:12-32:23; 35:7-16.
[53] Objection at 5.
[54] *Id.*
[55] *Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 830-32 (9th Cir. 2001) (citations omitted); *see also Rountree v. Ching Feng Blinds Indus. Co., Ltd.*, 2008 WL 7811565, * 2 (D. Alaska June 17, 2008) (citations omitted) (holding that expert opinion should not be excluded because his testimony was founded in facts).
[56] *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017, n.14 (9th Cir. 2004).

basis for a given claim."[57]

Here, Professor McCool's testimony is founded in fact, and therefore is admissible, because it is based on his review and analysis of tens and thousands of pages of materials, including documents produced in this case.[58] His expert report is over 59 pages and references 183 different sources.[59] Out of the myriad of information cited in Professor McCool's report, Defendants have identified two minor alleged inaccuracies that they claim demonstrate that he has failed to reliably apply qualitative methods to this case.[60] First, Defendants take issue with his statement about Marvin Marston's preferences at the state constitutional convention, and claim that Professor McCool "suggest[s]" (i.e. doesn't actually say this in the report) that Marston was opposed to the "read or speak" test.[61] The second alleged example of a purported "straightforward mistake" is the statement that Professor McCool's "misrepresents the holding of *Moore v. State.*"[62] In fact, his report makes no statement regarding the holding in that case. Professor McCool merely cited the *Moore* case and the *Kasayulie* case after stating that "rural schools continued to have serious funding issues" [after the Molly Hootch case].[63] Furthermore, although the court in *Moore* found no violation of the U.S. Constitution, it did find a violation of the state constitution.[64]

Defendants also claim that Professor McCool's report "contains striking omissions of evidence" but again only provide two alleged examples.[65] This is not the kind of extreme case that justifies exclusion of Professor McCool's testimony. Even assuming the flaws cited by the

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[57] *United States v. W.R. Grace*, 504 F.3d 745, 762 (9th Cir. 2007) (reversing district court's exclusion of expert, and rebuking it for taking a "document-by-document" approach to examining the factual basis of his testimony); *see McReynolds v. Sodexho Marriott Servs.*, 349 F. Supp. 2d 30, 42 (D.D.C. 2004) ("When the factual underpinnings of an expert's opinion are in dispute, it is not the role of the court to determine the correctness of the facts underlying the expert's testimony").
[58] McCool Depo. at 54:9-24; 55:9-56:4; 56:22-57:3; 58:7-23; *see* Expert Report at 48-59.
[59] *See* Expert Report at 48-59.
[60] *See* Objection at 6-7.
[61] Objection at 6.
[62] Objection at 7.
[63] *See* Expert Report at 28.
[64] *See Moore v. State*, case no. 3AN-04-9756-CIV (Alaska Super. Ct. June 21, 2007)
[65] Objection at 7.

Defendants are in fact flaws, they go to the credibility of Professor McCool's testimony, not its admissibility.[66]

## III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule Defendants' objection to Professor McCool, and permit him to testify at trial.

DATED this 19th day of June, 2014.

Respectfully submitted,

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[66] *See Hangarter*, 373 F.3d at 1017, n. 14; *see also U.S. v. Shea*, 211 F.3d 658, 667-68 (1st Cir. 2000) (any flaws in the application of an otherwise reliable methodology goes to weight and credibility, not admissibility.)

**Certificate of Service**

I hereby certify that on the 19th day of June 2014, a true and correct copy of the foregoing document was served electronically pursuant to the Court's electronic filing procedures upon the following:

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